INDEX

Subject Index

page

Petition for rehearing 1
Grounds 2
Certificate 3
Brief in support of petition for rehearing 5
Statement 5
Argument 8
Appendix 10
Petition National Ben Franklin v. Hastings 10
Amended Answer of Defendants 16
Order Directing Dismissal 20
Order Overruling Motion for New Trial 21
Certificate of Clerk of the Court 22
Remarks of court in directing verdict 24
Certificate of court reporter 26

Cases Cited

Hawks v. Hamil, 288 U. S. 52, 53 S. Ct. 240, 77 L. Ed. 610 7
Massey v. United States, 291 U. S. 608, 54 S. Ct. 532, 78 L. Ed. 1019 6
Sanitary Refrigeration Co. v. Winters, 280 U. S. 30, 50 S. Ct. 9, 74 L. Ed. 147 5
Schrieber-Schroth Co. v. Cleveland Trust Co., 305 U. S. 47, 59 S. Ct. 8, 83 L. Ed. 34 6

In The

Supreme Court of the United States

No. 310.

CENTRAL ELECTRIC AND GAS COMPANY,
A Corporation, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF LINCOLN, IN THE COUNTY OF LANCASTER, IN THE STATE OF NEBRASKA, A CORPORATION, RESPONDENTS.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

MAX KIER, Lincoln, Nebraska,
Counsel for Petitioner.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Central Electric and Gas Company, a corporation, does hereby respectfully request that re-

hearing of this petitioner's application for writ of certiorari to review the judgment of the United States Circuit Court of Appeals, Eighth Circuit in the above entitled cause be granted.

Petitioner shows that its application for writ of certiorari was denied on November 7, 1949.

This petition for rehearing is made under the provisions of Rule 33 (2) of the Revised Rules of the Supreme Court of the United States.

The controlling question governing the disposition of petitioner's application for writ of certiorari is the state of the law of the State of Nebraska with respect to the liability of suppliers of natural gas with reference to defects in the supply lines of its consumers of which the supplier neither had notice nor knowledge.

The grounds on which this petition for rehearing is based are:

1. That there is available other persuasive data as to the state of the Nebraska law with reference to the liability of the suppliers of natural gas with respect to the maintenance and preservation of service lines, which was neither considered by the United States Court of Appeals in its review of the judgment of the United States District Court for Nebraska, Lincoln Division, and which was not available to this court in its consideration of petitioner's application for writ of certiorari.

2. That the adjudication made by the District Court for the Tenth Judicial District for the State of Nebraska in the cause entitled *National Ben Franklin Fire Insurance Company* v. *The City of Hastings,*

Nebraska, case Number 12,624, previously not available to the court is a persuasive indication that the law of the State of Nebraska, contrary to the holding of the United States Court of Appeals, does not impose liability upon suppliers of natural gas for defects in the service lines of its consumers in the absence of actual notice of the defect in such lines having been communicated to the supplier.

3. That by reason of the unavailability of the decision of the District Court for the Tenth Judicial District in the State of Nebraska in said cause entitled *National Ben Franklin Fire Insurance Company* v. *The City of Hastings, Nebraska,* there exists intervening circumstances of substantial and controlling effect and substantial grounds for petitioner's application not previously presented to this court. Reference is made to the attached appendix for summary of the proceedings referred to, which is expressly incorporated in and made a part hereof.

For the foregoing reasons petitioner respectfully urges that a rehearing be granted; and upon further consideration the order of November 7, 1949, denying the petition for writ of certiorari be revoked; and that the writ of certiorari issue.

MAX KIER,
Attorney for Petitioner.

CERTIFICATE.

Comes now Max Kier, counsel for Central Electric and Gas Company, a corporation, petitioner, request-

ing rehearing of the order of the court denying petitioner's application for writ of certiorari and certifies that the above and foregoing petition for rehearing is presented in good faith and not for delay and that this petition is restricted and confined to intervening circumstances of substantial effect and to substantial grounds available to the petitioner, although not previously presented.

MAX KIER,
Counsel for Petitioner.

In The

Supreme Court of the United States

No. 310.

CENTRAL ELECTRIC AND GAS COMPANY,
A Corporation, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF LINCOLN, IN THE COUNTY OF LANCASTER, IN THE STATE OF NEBRASKA, A CORPORATION, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

STATEMENT.

Petitioner's application for writ of certiorari was denied on November 7, 1949. The basis for this petition for rehearing is the existence of other circumstances of substantial or controlling effect and other substantial grounds available to petitioner not previously presented. This petition is made under rule 33 (2) of the Revised Rules of the Supreme Court of the United States and under the sanction of *Sanitary Refrigeration Co.* v. *Winters,* 280 U. S. 30, 50 S. Ct. 9, 74 L. ed. 147; *Massey* v. *U. S.,* 291 U. S. 608, 54

S. Ct. 532, 78 L. ed. 1019; *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 59 S. Ct. 8, 83 L. ed. 34.

A motion for directed verdict was sustained by the trial court in this cause, to-wit: The District Court of the United States for the District of Nebraska, Lincoln Division, because of the failure of the evidence to disclose that the petitioner, defendant in said cause, had any knowledge or notice of the existence of the defect in the supply lines through which it introduced natural gas, or had any notice or knowledge that gas was leaking in and about the premises, or being confined or otherwise impounded. The trial court held that the disclosure of such notice or knowledge was a prerequisite to the imposition of liability upon a supplier of natural gas for defects or deterioration in supply and service lines located in the property of its consumers. The United States Court of Appeals for the Eighth Circuit—one judge dissenting—reversed the trial court and remanded this cause for rehearing upon the asserted basis that under the Nebraska law, liability could be imposed upon suppliers of natural gas in the absence of actual notice or knowledge being imparted to the supplier and based solely and only upon the implied knowledge of the supplier as to the length of time the service and supply lines had been in the ground (Opinion of the Court of Appeals may be found in 174 F. (2d) 215).

Petition for writ of certiorari was duly filed in this court for the reason that the United States Court of Appeals had improperly resolved important questions of local law. Petitioner's brief suggested and indicated

other holdings of the Supreme Court of the State of Nebraska in negligence actions indicating that liability for negligence in the State of Nebraska is predicated upon actual knowledge rather than any doctrine of constructive knowledge. Petitioner's application for writ of certiorari did not make reference to *National Ben Franklin Fire Insurance Company* v. *the City of Hastings, Nebraska,* a municipality, being case Number 12624 of the Tenth Judicial District of the State of Nebraska. That adjudication was made by a court of general jurisdiction of the State of Nebraska (Sec. 9, Art. 5, Const. of Neb.) That adjudication which terminated by an order of the court overruling the motion of the plaintiff therein for a new trial made on February 25, 1949, has since become final. Though it is a determination of an intermediate court of the State of Nebraska, it is entitled to consideration as persuasive data available as to the state of the local law of the State of Nebraska. (*Hawks* v. *Hamil,* 288 U. S. 52, 535 S. Ct. 240, 77 L. ed. 610).

The adjudication referred to is of importance in that it directly considered the liability of the City of Hastings, Nebraska, in its proprietary capacity as a supplier of natural gas. It directly involved the liability of such supplier of natural gas for defect in the service and supply lines of its consumer. Other factual similarities will be pointed out. It is petitioner's contention that this adjudication previously unavailable and not submitted constitutes grounds for a reconsideration by the court of its order denying petitioner's application for writ of certiorari.

ARGUMENT.

The case of *National Ben Franklin Fire Insurance Company* v. *The City of Hastings, Nebraska,* case #12624 of the Tenth Judicial District of the State of Nebraska, as previously indicated, was an action against a supplier of natural gas, the City of Hastings, Nebraska, for damage to the property known and described as the Elks Lodge, which damage resulted from an explosion of gas traceable to a break in the service line placed in the property of the Elks Lodge. A certified copy of the petition and amended answer are attached hereto as an appendix and are made a part of this brief. Trial was had, evidence adduced and at the conclusion thereof a motion for a directed verdict was made by the defendant, the City of Hastings. The motion was predicated upon the failure of the evidence to disclose that the city had any notice or knowledge of the defect, which permitted the escape of gas. The motion was considered by the court, argument as to the law of the State of Nebraska was presented by the respective counsel and at the conclusion thereof the court sustained the motion for a directed verdict, and at the instruction of the court a verdict was returned in behalf of the defendant and against the plaintiff. The basis for the direction of the verdict and the action of the trial court in sustaining the motion was the failure of the evidence to disclose actual knowledge on the part of the defendant as to the existence of the defect which gave rise to the explosion and damages consequential thereto. In the absence of the showing of such actual knowledge, negligence could not be made out.

A synopsis of the proceedings which were had is attached hereto as a part of the appendix and made a part of this brief. It is submitted that the United States Court of Appeals in its review of this cause, and that this court in its consideration of petitioner's application for writ of certiorari did not have before it all of the data now available as to the state of the Nebraska law upon the important question thus presented and that this petitioner is entitled to a rehearing of its petition in the light of the fuller data now presented.

Respectfully submitted,

CENTRAL ELETRIC AND GAS COMPANY,
A CORPORATION,
Petitioner,

MAX KIER,
Counsel for Petitioner.

APPENDIX

IN THE DISTRICT COURT OF ADAMS COUNTY, NEBRASKA.

PETITION #12624.

NATIONAL BEN FRANKLIN FIRE INSURANCE COMPANY, A Corporation and MILWAUKEE MECHANICS' INSURANCE COMPANY, A Corporation, subrogees of BENEVOLENT AND PROTECTIVE ORDER OF ELKS #159, HASTINGS, NEBRASKA, Plaintiffs,

Vs.

CITY OF HASTINGS, NEBRASKA, A Municipal Corporation, Defendants

Comes now the plaintiffs and for their cause of action against the defendant, allege:

1. That the plaintiff, National-Ben Franklin Fire Insurance Company is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and in all times mentioned herein was authorized to do business in the State of Nebraska.

2. That the Milwaukee Mechanics' Insurance Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and at all times herein mentioned was authorized to do business in the State of Nebraska.

3. That at all times herein mentioned, the defendant, City of Hastings, Nebraska was a municipal corporation organized and existing under and by virtue of the laws of the State of Nebraska.

4. That on December 30, 1945, and for a long time prior thereto, the Benevolent and Protective Order of Elks #159, Hastings, Nebraska (hereinafter referred to as the Elks Club) was a local lodge of a national benevolent and fraternal organization, and in the City of Hastings, Nebraska, organized and existing under and by virtue of the charter from the Grand Lodge of the B. P. O. E., located in the City of New York, State of New York; that at said time, it owned and was in possession of property located at the northeast corner of Denver and Fifth Streets, in the City of Hastings, Nebraska, commonly known as 502 North Denver Avenue, and 514 West Fifth Street, which it occupied and used as a public building; that it also owned and possessed the contents of said club building, including all furnishing and fixtures therein.

5. That at all times herein mentioned, the officers, trustees, managers, members, agents, servants and employees of the Elks Club were in the exercise of due care and caution for the safety and protection of the Elks Club property.

6. That on December 30, 1945, and for a long time prior thereto, the defendant was engaged in the business of conducting and operating a certain gas plant in the City of Hastings, Nebraska, and in the business of furnishing to the inhabitants of said City and vicinity natural and artificial gas; that in said business, the

defendant then and there had and controlled divers pipes, tubes, connections and fixtures for the purpose of carrying said natural and artificial gas from its main plant to the divers consumers thereof in the said city and vicinity and by its agents, servants and employees, then and there operated and managed said plant and equipment.

7. That in connection with its business of carrying and transporting natural and artificial gas through the public streets of Hastings, Nebraska, for sale to residents and places of business therein, defendant owned, managed and controlled, among others, a certain pipe line known as the "main line", extending in an easterly and westerly direction under the paved surface of Fifth Street in said city, approximately midway between the curblines of said street; that at a point, towit, 30 feet east of Denver Avenue, there was attached to said main line under Fifth Street, a smaller pipe line known as a "service line" which ran in a general northerly direction under the surface of the ground, at a point approximately 12 inches south of the south foundation wall of the Elks Club building above described; that said service line was opened, managed and controlled by the defendant; that said service pipe was plugged at its northerly terminus and did not enter the Elks Club building, but that the connection by which it was attached to the defendant's main line, herein described, permitted natural and artificial gas to flow from said main line into said service line.

8. That the natural and artificial gas furnished and manufactured by the defendant is a highly inflammable, explosive and volatile gas and that it was then and there the duty of the defendant to use a high degree of care and caution to prevent said gas from escaping from any of its said pipes, fixtures and connections upon the premises and into the building of the Elks Club so that the same might become ignited and destroy or damage the said property.

9. That notwithstanding its duty as aforesaid, defendant did carelessly and negligently permit its said main line and service line to become deteriorated, corroded, rusted and broken, whereby large quantities of natural and artificial gas were permitted to escape on and near the Elks Club premises and to flow under the surface of the ground and into the basement of the Elks Club Building.

10. That the defendant well knew or by reasonable inspection could and should have known the defective condition of its main line and service line, as aforesaid.

11. That as a direct and proximate result of the negligence and careless conduct of the defendant, as aforesaid, a gas explosion was caused to and did occur in the basement of the Elks Club building on, to-wit: December 30, 1945, whereby said building and the contents thereof were greatly damaged, destroyed and wrecked.

12. That on December 30, 1945, there were, in full force and effect, certain policies of fire insurance,

theretofore issued by National-Ben Franklin Fire Insurance Company to the Elks Club, insuring the Elks Club against loss to its building and the contents thereof by fire and explosion; that the Elks Club duly complied with all the terms and provisions of said policies, and thereafter, National-Ben Franklin paid to the Elks Club the total sum of $3,165.32 in full satisfaction of its liability under said policies of insurance for loss and damage as a result of the explosion herein described; that the Elks Club has executed certain Articles of Subrogation whereby it has assigned to National-Ben Franklin all its rights of action, arising out of said explosion, to the extent of said payment; all of which will be duly shown upon the trial of this case, or as the court may direct.

13. That on December 30, 1945, there were, in full force and effect, certain policies of fire insurance, theretofore issued by Milwaukee Mechanics' Insurance Company to the Elks Club, insuring the Elks Club against loss to its building and the contents thereof by fire and explosion; that the Elks Club duly complied with all the terms and provisions of said policies, and thereafter, Milwaukee Mechanics' paid to the Elks Club the total sum of $2,272.41 in full satisfaction of its liability under said policies of insurance for loss and damage as a result of the explosion herein described; that the Elks Club has executed certain Articles of Subrogation whereby it has assigned to Milwaukee Mechanics' all its rights of action, arising out of said explosion, to the extent of said payment, all of which will be duly shown upon the trial of this case, or as the court may direct.

WHEREFORE plaintiff, National-Ben Franklin Fire Insurance Company, a corporation, prays the entry of judgment against the defendant, City of Hastings, Nebraska, a municipal corporation, for the sum of $3,165.-32 and costs of suit and the plaintiff, Milwaukee Mechanics' Insurance Company, a corporation, prays the entry of judgment against the defendant, City of Hastings, Nebraska, a municipal corporation, for the sum of $2,272,41 and costs of suit.

NATIONAL-BEN FRANKLIN FIRE INSURANCE COMPANY, A Corporation, and

MILWAUKEE MECHANICS' INSURANCE COMPANY, A Corporation, Plaintiffs

By /s/ Blackledge & Conway
Their Attorneys

STATE OF NEBRASKA)
)ss.
COUNTY OF ADAMS)

Fred R. Irons, being first duly sworn, deposes and says that the plaintiffs above named are both corporations and that he is one of the attorneys for the same and he knows the contents of the foregoing petition and that the facts stated therein are true as he verily believes.

/s/ Fred R. Irons

Subscribed to and sworn to in my presence this 20 day of August, 1947.

/s/ Isa Bruckman
Notary Public

Isa Bruckman
Notarial
SEAL
Commission Expires
Mar 23, 1950
Adams County, Nebraska

Filed Aug. 20, 1947
Verner W. Felker
Clerk of the District Court
Adams County
Nebraska

IN THE DISTRICT COURT OF ADAMS COUNTY, NEBRASKA

AMENDED ANSWER OF DEFENDANT

No. 12624

NATIONAL BEN FRANKLIN FIRE INSURANCE COMPANY, A Corporation, et al, Plaintiffs

Vs.

CITY OF HASTINGS, NEBRASKA, A Municipal Corporation, Defendant

Comes now City of Hastings, Nebraska, the defendant herein, and for its answer to the petition of the plaintiff alleges:

1.

That it admits each of the facts alleged in Paragraphs 1, 2, 3 and 4 of said petition.

2.

That it denies each and every allegation contained in the petition of the plaintiff not herein specifically admitted to be true.

3.

That any damage to the building of Benevolent and Protective Order of Elks, No. 159, Hastings, Nebraska (hereinafter referred to as the Lodge), on or about the 30th day of December, 1945, was not due to any negligence on the part of the defendant, but was the result of the negligence of the Lodge directly contributing thereto in each of the following respects:

(a) It permitted a service line, connected to the gas main in Fifth Street and running north therefrom across and under its premises located immediately north of Fifth Street, to remain in the ground owned and controlled by it, and failed to remove the same after its building was built upon said premises.

(b) It permitted the northern terminus of said service line upon its premises to be and remain improperly closed or plugged.

(c) It failed to notify the defendant of the location and condition of the part of said service line located in the ground owned and controlled by it.

(d) In 1945, about two or three months preceding December 30, 1945, it caused a part of the ground owned by the defendant and dedicated to the public for use as a public street, and particularly the part

thereof located immediately south of the premises of the Lodge, to be covered with a concrete apron thereby rendering it impossible for the defendant to inspect or repair any part of said service line located below the surface of said apron, and said construction was done and performed without the knowledge, consent or authority of the defendant.

(e) By constructing the concrete apron as aforesaid, it sealed the ground around its building thereby rendering it impossible for any escaping gas to rise to the surface of the ground.

(f) In the construction of said concrete apron it failed to secure permission for said construction from the Mayor and Council of the City of Hastings, and it failed to furnish any bond, and thereby violated Chapter 4, Article I (e) Sec. 4 of the Municipal Code of the City of Hastings, Nebraska, which provided:

> "(It shall be and is hereby declared unlawful for any persson or persons to construct or cause to be constructed in said City of Hastings, any driveway or apron over the curb and corner of the streets and avenues of the City of Hastings without specific permission from the Mayor and Council. Before any such permit shall be issued, the applicant to whom said permit is to be issued shall furnish good and sufficient bond in the sum of $1000.00 to be approved by the Mayor to secure the City against any damages that may arise or accident that may be incident to such apron constructed. * * *")

4.

That any break or defect in the aforesaid service line was caused by the carelessness and negligence of the

Lodge, its agents, servants, employees and by contractors employed by it incident to the grading for the concrete apron constructed south of the premises of the Lodge as aforesaid.

WHEREFORE, the defendant prays that the petition of the plaintiffs herein be dismissed and that the defendant go hence without day and recover its costs.

CITY OF HASTINGS, NEBRASKA,

By /s/ J. E. Ray,
Its Attorney.

STATE OF NEBRASKA)
)ss.
ADAMS COUNTY)

J. E. Ray, being first duly sworn on oath deposes and says that he is the duly qualified and acting City Attorney for the City of Hastings, Nebraska, defendant herein; that he has read the foregoing answer, knows the contents thereof, and the allegations therein contained are true as he believes.

/s/ J. E. Ray

Subscribed and sworn to before me this 5th day of February, 1949.

/s/ Verner W. Felker
Clerk of District Court

District Court
Official
SEAL
Adams County, Nebraska

Filed Feb. 7, 1949
Verner W. Felker, Clerk of
District Court
Adams County, Nebraska

IN THE DISTRICT COURT OF ADAMS COUNTY, NEBRASKA

Journal Entry

NATIONAL - BEN FRANKLIN FIRE INSURANCE COMPANY, A Corporation, and MILWAUKEE MECHANICS' INSURANCE COMPANY, A Corporation, Subrogees of the Benevolent and Protective Order of Elks, Hastings, Nebraska, Plaintiffs,

Vs.

CITY OF HASTINGS, NEBRASKA, A Municipal Corporation, Defendant

Note: The following is a copy of the last two paragraphs of Journal Entry filed in the office of the Clerk of the District Court, Adams County, Nebraska, on February 25, 1949:

"Now on this 10th day of February, 1949, pursuant to the recess heretofore taken in the trial of said case, the parties being present by their counsel, trial proceeds, and the plaintiffs continue to adduce their evidence, and at 10:35 A.M. the plaintiffs rest. The defendant, by its counsel, moves for a directed verdict, and said motion is considered by the court, and argument is made with respect thereto by counsel for each of the parties, and in consideration thereof and of the pleadings and evidence herein, the court finds that said motion should be sustained.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THE COURT:

That the motion of the defendant for an order directing the jury to return a verdict in favor of the defendant and against the plaintiff should be and the same is hereby sustained; that the action of the plaintiffs should be, and it is hereby dismissed, and the costs are taxed to the plaintiffs and the Jury discharged, to all of which the plaintiffs except.

/s/ EDMUND NUSS
Judge.

O. K. Form—JDC

IN THE DISTRICT COURT OF ADAMS COUNTY, NEBRASKA.

JOURNAL ENTRY #12624.

NATIONAL-BEN FRANKLLIN FIRE INSURANCE COMPANY, A Corporation, and MILWAUKEE MECHANICS' INSURANCE COMPANY, A Corportion, PLAINTIFFS,

V.

CITY OF HASTINGS, NEBRASKA, A Municipal Corporation, DEFENDANT.

Now on this 25th day of February, 1949, it being one of the days of a regular term of this court, this case came on to be heard upon the motion of the plaintiff for a new trial of said case and was submitted to the court, and the Court being fully advised, finds that said motion and each part thereof should be overruled and denied.

It is Therefore Considered and Ordered by the Court:

That the motion of the defendant for a New Trial herein should be, and the same is hereby overruled and denied.

/s/ EDMUND NUSS
Judge.

O. K. Form—/s/ Blackledge & Conway-Irons.

Filed Feb. 25, 1949
Verner W. Felker
Clerk of District Court
Adams County, Nebraska.

STATE OF NEBRASKA,)
Adams County,) ss.

IN THE DISTRICT COURT OF THE TENTH JUDICIAL DISTRICT, ADAMS COUNTY, NEBRASKA.

I, Verner W. Felker, Clerk of the District Court, in and for said County, do hereby certify that I have compared the foregoing copy of PETITION; AMENDED ANSWER OF DEFENDANT; PART OF JOURNAL ENTRY OF FEB. 10, 1949 and JOURNAL ENTRY OF FEBRUARY 25, 1949, in Case No. 12624 - Doc. 43 - Page 224 - NATIONAL BEN FRANKLIN FIRE INSURANCE COMPANY, A Corporation and MILWAUKEE MECHANICS' INSURANCE COMPANY, A Corporation, Plaintiffs Vs. CITY OF HASTINGS, NEBRASKA, A Municipal Corporation, Defendant.

with the original record thereof, now remaining in said court; that the same is a correct transcript thereof,

and of the whole of said original record; and that I have the legal custody and control of said original record; that said court is a court of record, has a seal, and that said seal is hereto affixed; and that the foregoing attestation is in due form, according to the laws of the State of Nebraska.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 12th day of November A. D., 1949.

(Seal) Signed Verner W. Felker

VERNER W. FELKER,
Clerk of the District Court.

IN THE DISTRICT COURT OF ADAMS COUNTY, NEBRASKA.

REMARKS OF THE COURT.

Case No. 12624

NATIONAL BEN FRANKLIN FIRE INS. CO., ET AL, PLAINTIFFS,

V.

CITY OF HASTINGS, NEBRASKA, DEFENDANT.

Before His Honor, Judge Edmund Nuss and Jury, Hastings, Nebraska, February 8-9, 1949.

Appearances:

BLACKLEDGE, CONWAY & IRONS,
Attorneys for Plaintiffs.

STINER & BOSLAUGH,
J. E. RAY,
Attorneys for Defendant.

MR. CONWAY:- That's all we have, Your Honor. Plaintiffs rest.

MR. STINER:- Comes now the defendant at the close of the plaintiffs' case in chief and moves the Court to direct the jury to return a verdict in favor of the defendant for the reason the evidence offered by the plaintiffs is not sufficient to sustain any judgment of the plaintiffs against the defendant. I would like to be heard on this, Your Honor.

THE COURT:- Very well. The jury may retire to the jury room until called. (Jury retires). Proceed.

(Argument had).

THE COURT:- Call in the jury. (Done). Ladies and gentlemen of the jury: At this stage of a trial it frequently happens that the defendant makes what is known as a motion for a directed verdict. That means, substantially, that the evidence in the case, given its most favorable inference on behalf of the plaintiffs, is not enough to go to the jury.

Under the law, if there is a complete lack of evidence, or if the evidence, legally considered, is not sufficient upon which a jury could bring in a verdict, then it bcoms the duty of the Court to determine and decide the case.

In this case the plaintiffs sue the defendant on the ground of negligence. That means that the plaintiffs must prove that the defendant did something that an ordinarily prudent man would not have done, or failed to do something that an ordinarily prudent man would have done under the circumstances, which negligence caused damage to the plaintiffs.

It appears without question that the carrier of the insurance on the Elks Club after the explosion paid the damage to the Elks Club and received therefrom a subrogation right and under that they have a perfect right to bring an action to recover on the same basis the Elks Club might have recovered, but they are limited to the basis on which the Club might have proceeded. In other words, their rights are neither greater nor less than the rights of the Club would have been.

In this case there is no evidence whatever of negligence on the part of the city in maintaining its gas liness or permitting gas to escape. It is reasonably clear that the mere fact that the explosion was caused by a defective gas line of the city would not of itself be sufficient grounds to take the case to the jury. There must be a showing of negligence on the part of the defendant. The evidence must show a situation that the defendant did something that an ordinarily prudent person would not have done, or, that the defendant failed to do something that an ordinarily prudent person would have done.

It is claimed that the city did not properly construct the gas lines and permitted the gas to leak. There is no evidence of any improper construction which might have been disclosed, and the reasonable inference would, in fact, disclose no such situation here. The evidence indicates that the break must have existed for some time, yet there was no complaint of the smell of gas by anyone in the vicinity before the explosion occurred. This break did not affect the pressure of the gas in the house just east of the Elks Club which received its supply from this particular line.

There is no actual negligence here and no negligence which might be inferred from the circumstances. No evidence to connect the city with the actual breaking of the pipe and no evidence as to how long it had been broken. But no notice of any leaky condition there was ever given to the city, nor was it a situation whereby the city should have known there was a break in the line. No evidence that anyone smelled gas at the Elks Club that night. No evidence there was a smell of gas just before the explosion.

As I see it there is nothing for the Court to do but to direct a verdict in favor of the defendant and that will be done.

CERTIFICATE.

State of Nebraska,)
) ss.
10th Judicial District.)

I, Lee W. Johnston, one of the official court reporters within and for said district and state, do hereby certify that I reported the trial of the above entitled case and that the foregoing Remarks of the Court is a true and correct transcript of that portion of the proceedings as fully appears from my shorthand notes made and taken at the time.

In testimony whereof I have hereunto set my hand at Red Cloud in said district and state this 12th day of November, 1949.

Signed Lee W. Johnston
Reporter.

Fee $2.50.